

## *Mapp v. Ohio*: Doomed from the Beginning?

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TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE* (Oxford University Press 2013)

I am sometimes guilty of reading only a paragraph or two of a book review. In case any of my readers are also guilty of that sin, let me say here that Tracey Maclin's book on the exclusionary rule is one of the best books ever written about the Fourth Amendment. It is also one of the best books about how the Court creates constitutional doctrine. Maclin's book is based on exhaustive research with primary sources—principally, papers of justices that include letters, memos, notes from conferences, and drafts of opinions. By drawing on those sources, Maclin tells a behind-the-scenes story that unveils the deeper meaning of the published opinions.

I will unpack my thesis in more detail as we go along, but what is new and fresh is evidence that the seeds of destruction of the Fourth Amendment exclusionary rule were planted much earlier than I thought and by its creator, the Warren Court. Indeed, the same justice who wrote the majority opinion in *Mapp v. Ohio*<sup>1</sup> four years later wrote the opinion that doomed *Mapp*, at least a robust version of *Mapp*. The villain, or hero depending on your point of view, is Justice Tom Clark, and the case is *Linkletter v. Walker*.<sup>2</sup> But, wait, you say. *Linkletter* is a retroactivity case, and a failed one at that. What does it have to do with *Mapp*'s demise? The answer is everything, though *Linkletter* got a minor assist from another Warren Court case, *Alderman v. United States*,<sup>3</sup> and a major assist from the Burger Court in *United States v. Peltier*.<sup>4</sup> Now wait, again: at least I've read *Alderman*, but it was a standing case; I've never read *Peltier*.

Nor had I until I read Maclin's book. My thesis here is that one can draw a straight line from *Peltier* to *Herring v. United States*,<sup>5</sup> a Roberts Court case setting the stage for what might be a "final solution" to the exclusionary rule as envisioned

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<sup>1</sup> 367 U.S. 643 (1961).

<sup>2</sup> 381 U.S. 618 (1965).

<sup>3</sup> 394 U.S. 165 (1969).

<sup>4</sup> 422 U.S. 531 (1975).

<sup>5</sup> 555 U.S. 135 (2009).

by *Mapp*.<sup>6</sup> First, I want to lay the groundwork for the argument. As students of the Fourth Amendment know, the road from a rule of suppression in federal cases to one that applies also in state courts—which is conventionally dated from the 1914 case of *Weeks v. United States*<sup>7</sup> to *Mapp v. Ohio* in 1961—was far from smooth. Because *Weeks* hewed to Chief Justice Marshall's opinion in *Barron v. Baltimore*<sup>8</sup> that the Fourth Amendment did not apply to the states, the Court had to deal, beginning in 1927, with the "silver platter" doctrine. State officials who seized evidence in a manner that would violate the federal constitution could turn the evidence over to federal prosecutors on a "silver platter." It was admissible as long as there was no federal involvement in the discovery of the evidence.<sup>9</sup> There was, naturally, the possibility of a "reverse silver platter" doctrine where federal officials turned evidence seized in violation of the Fourth Amendment over to state prosecutors in states that had no exclusionary rule.<sup>10</sup> The Court also had to deal with the awkward compromise of *Wolf v. Colorado*,<sup>11</sup> which incorporated the "security of one's privacy against arbitrary intrusion by the police"<sup>12</sup> into the Fourteenth Amendment but then withheld the federal remedy of exclusion.

By the time the Court found five votes to apply the federal exclusionary rule to the states, one senses the relief in Justice Clark's majority opinion in *Mapp*. Applying the exclusionary rule to the states allowed the Court to extricate itself from the complications of excluding reliable evidence in some criminal trials but not others.

Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold . . . . In non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized

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<sup>6</sup> See Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463 (2009) (raising the possibility that *Herring* might portend a radical change to the exclusionary rule).

<sup>7</sup> 232 U.S. 383 (1914). I believe that the modern exclusionary rule began in 1920 with Justice Holmes's opinion for the Court in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), but I need not defend that claim in this review.

<sup>8</sup> 32 U.S. (7 Pet.) 243 (1833).

<sup>9</sup> See *Gambino v. United States*, 275 U.S. 310, 317 (1927) (dicta); *Byars v. United States*, 273 U.S. 28, 33 (1927) (dicta).

<sup>10</sup> See *Rea v. United States*, 350 U.S. 214 (1956) (upholding an injunction that prevented a federal official from turning evidence over to New Mexico prosecutors).

<sup>11</sup> 338 U.S. 25 (1949).

<sup>12</sup> *Id.* at 27.

evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated.<sup>13</sup>

Finally, the Court seems to say, we have licked the problem of inconsistent application of the exclusionary rule. Well, yes, but the Court's problems with the exclusionary rule were just beginning. Maclin points out that Justice Clark's opinion in *Mapp* is the first of the problems. (Pp. 92–93.) It reads as if it were written by a timid committee that felt it had to treat *Wolf* with deference. Why extend the exclusionary rule to the states? Well, we have learned in the years since *Wolf* that nothing else has worked to deter violations of the Fourth Amendment. Though Clark offered other reasons to require the states to use the exclusionary rule, the only one that justified overruling *Wolf* (decided only twelve years earlier) was the lack of deterrence of other approaches. Tying exclusion to deterrence is the weak link that opponents will hammer for the next 50 years, and perhaps the 50 years after that, too.

A stronger opinion would have stated that *Wolf* was a mistake; we are extending the Fourth Amendment, lock, stock, and barrel, to the states; and we embrace what Justice Holmes said about exclusion in *Silverthorne Lumber Co. v. United States*: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."<sup>14</sup> As Maclin says, "Clark's opinion did not have the focus or clarity of *Silverthorne Lumber* . . ." (P. 99.) To be sure, Clark added a paragraph about "the imperative of judicial integrity,"<sup>15</sup> to which I shall return in a moment, but it reads like an after-thought. He uses judicial integrity not as a central argument but rather to minimize Cardozo's famous claim that the exclusionary rule frees the guilty.<sup>16</sup> *Mapp* would have had a more solid foundation if Clark had made judicial integrity central to the argument; in a later dissent, for example, Justice Brennan said that judicial integrity meant that judges should "avoid the taint of partnership in official lawlessness." (P. 99.)<sup>17</sup>

Indeed, a question lurking here is why Warren assigned the opinion to Clark. Why wouldn't the Chief Justice want to write it himself, as he did *Miranda v. Arizona*<sup>18</sup> and *Terry v. Ohio*?<sup>19</sup> *Miranda* was tricky business because the Court

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<sup>13</sup> *Mapp v. Ohio*, 367 U.S. 643, 657–58 (1961).

<sup>14</sup> 251 U.S. 385, 392 (1920).

<sup>15</sup> *Mapp*, 367 U.S. at 659.

<sup>16</sup> *Id.*

<sup>17</sup> Maclin here quotes *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)).

<sup>18</sup> 384 U.S. 436 (1966).

<sup>19</sup> 392 U.S. 1 (1968).

invented a series of warnings to protect against what it characterized as inherently coercive custodial police interrogation; both of those doctrinal moves were utterly unprecedented. *Terry* was tricky business because the Court invented a new kind of seizure and search—stop and frisk—that would be governed by different standards from the traditional arrest and search incident to arrest. In some ways, *Mapp* was even trickier business. A bare majority was going to overrule an opinion written only twelve years earlier by Justice Frankfurter, generally regarded as the Court's most scholarly justice, and Frankfurter was still on the Court. Moreover, as Justice Harlan stresses in his dissent, the Court overruled *Wolf* without the benefit of the question being briefed at all or argued in any detail.<sup>20</sup> Harlan accused the majority of changing its mind on *Wolf* for no good reason: "It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law."<sup>21</sup>

As to why Warren did not take the opinion for himself, perhaps as Chief Justice, he did not want to unnecessarily alienate Frankfurter, who apparently was difficult to "manage." (Pp. 87–88.)<sup>22</sup> One historical account has Warren asking Black to write *Mapp* after Black agreed that *Wolf* should be overruled and Black refusing. (P. 87 n.21.)<sup>23</sup> Black's refusal makes sense because he had joined the majority in *Wolf*. But why not Brennan?

Justice Black's critical fifth vote actually provides another reason *Mapp* was unstable. He joined Clark's opinion, but he filed a concurring opinion that borders on the bizarre. Maclin says, with more diplomacy: "In the final analysis, Black's legal reasoning in *Mapp* is unconvincing and mistaken." (P. 103.) Prior to *Mapp*, Justice Black had consistently rejected a Fourth Amendment exclusionary rule because it is not in the language of the Fourth Amendment. He joined the majority in *Mapp* because he was suddenly willing to adopt the rationale of *Boyd v. United States*,<sup>24</sup> an 1886 case holding that the Fifth Amendment right against compelled self-incrimination when combined with the Fourth Amendment somehow, almost magically, creates an exclusionary rule in Fourth Amendment cases. In his concurring opinion in *Mapp*, Black said that while a Fourth Amendment exclusionary rule is "perhaps not required by the express language of the Constitution strictly construed, [it] is amply justified from an historical standpoint, soundly based in reason, and entirely consistent with what I regard to be the proper

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<sup>20</sup> *Mapp*, 367 U.S. at 675–77 (Harlan, J., dissenting) (noting, *id.* at 676, that the *Wolf* "question was briefed not at all and argued only extremely tangentially").

<sup>21</sup> *Id.* at 677 (Harlan, J., dissenting).

<sup>22</sup> See, e.g., (P. 87–88 n.21.) (at one of the conferences on *Mapp*, "Frankfurter became violent. He shook, almost cried . . .") (quoting POLLY J. PRICE, JUDGE RICHARD ARNOLD: A LEGACY OF JUSTICE ON THE FEDERAL BENCH 54 (2009)).

<sup>23</sup> See ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 555 (1994).

<sup>24</sup> 116 U.S. 616 (1886).

approach to interpretation of our Bill of Rights . . . .”<sup>25</sup> It is hard to know what that even means, and the introduction of the Fifth Amendment as a crucial part of the explanation of Black’s fifth vote surely “undermined the legal standing of *Mapp*.” (P. 103.)

A casual student of the Fourth Amendment exclusionary rule would be forgiven for thinking that nothing much happened between *Mapp* in 1961 and 1974 when *United States v. Calandra*<sup>26</sup> held that the exclusionary rule did not apply in grand jury hearings. Maclin shows us, however, that *Mapp* was undone by the Warren Court in its twilight years. Begin with the 1965 case of *Linkletter v. Walker*. Though on the surface *Linkletter* was only about whether to apply *Mapp* retroactively, it was substantively much, much more. As Maclin puts it, “*Linkletter* rejected the *Weeks-Silverthorne Lumber* view that exclusion was compelled by the Fourth Amendment. Looking back, it is now clear that *Linkletter* reconstructed the foundation upon which the exclusionary rule rested.” (P. 108.) This occurred only four years after *Mapp* and with the Warren Court at its most liberal point: Warren, Douglas, Brennan, Goldberg, and Clark formed a solid liberal bloc of five, and Black provided a sixth vote in favor of a broad reading of *Mapp*.

But only two justices—Douglas and Black—favored applying *Mapp* retroactively. (P. 110.) And in an historical irony, Justice Clark wrote the opinion in *Linkletter*, effectively killing his own creation. Maclin is less dramatic on this point, saying that “Clark’s opinion in *Linkletter* was a major retreat from *Mapp*.” Here, Maclin corrects the historical record: “Liberal legal scholars and the press are quick to blame the Burger and Rehnquist Courts for dismantling the exclusionary rule. But *Linkletter* did much of the dismantling long before the Burger and Rehnquist Courts came upon the scene.” (P. 115.)

The problem was that the Court had yet to work out a coherent theory of retroactivity involving new criminal procedure rules. To that point, all of the new criminal procedure constitutional rules had been applied not only to cases on direct review but also to collateral attacks that prisoners filed after their convictions had become final. The new criminal procedure rules prior to *Mapp* had, however, involved challenges to the fairness of the process: failure to provide an indigent a transcript for the appeal; failure to shield the jury from hearing coerced confessions; and failure to provide indigents with counsel.<sup>27</sup> One can easily see that facing a prosecutor without counsel or being tried before a jury that has heard the defendant’s confession is a fundamentally unfair trial; and an appeal where the indigent appellant did not have a copy of the transcript is hardly a fair appeal.

*Mapp* presented the Court with its first new criminal procedure rule that did not call into question the fairness of the process. The justices manifested their concern with this difference during conference. Chief Justice Warren said that the

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<sup>25</sup> *Mapp*, 367 U.S. at 662–63 (Black, J., concurring).

<sup>26</sup> 414 U.S. 338 (1974).

<sup>27</sup> See *Griffin v. Illinois*, 351 U.S. 12 (1956) (transcript); *Jackson v. Denno*, 378 U.S. 368 (1964) (coerced confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).

case “greatly bothered him,” and Justice Brennan said that “this case has given [me] great trouble.” (Pp. 109–110) Justices Clark, Harlan, Stewart, and Goldberg expressed similar reservations. (P. 110.) The Court could have done what it would eventually do in *Teague v. Lane*:<sup>28</sup> restrict new criminal procedure rulings such as *Mapp* to cases not yet tried or that are on direct appeal (with some exceptions unlikely to arise today). Linkletter, who was in prison when *Mapp* was decided, would under the *Teague* rule be barred from benefitting from its holding. In 1965, however, that idea was not part of the retroactivity conversation. Thus, unless the Court came up with another way to limit *Mapp*, it faced the prospect of thousands of prisoners being freed via collateral attack. No such cataclysmic consequences attended the earlier rules held to be retroactive.<sup>29</sup> Because of the fear of thousands of collateral attacks, and because the fairness of a trial or appeal was not directly affected by exclusion, the Court decided to weigh the pros and cons of making a new rule available on collateral attack. This led Justice Clark, speaking for seven members of the Court, to say some pretty remarkable, and destabilizing, things about *Mapp*.

Looking for a reason not to apply *Mapp* retroactively, Clark settled on identifying the “prime purpose” of *Mapp* as the deterrence of “lawless police action.”<sup>30</sup> That provided a compelling reason not to apply *Mapp* to police conduct that occurred before it was decided. In Clark’s understated manner: “We cannot say that this purpose would be advanced by making the rule retrospective.”<sup>31</sup> As I noted earlier, part of Clark’s opinion in *Mapp* was a stirring paragraph stressing that excluding evidence seized in violation of the Fourth Amendment was required by judicial integrity. Responding to Judge Cardozo’s criticism that the exclusionary rule allows the criminal “to go free because the constable has blundered,”<sup>32</sup> Clark wrote in *Mapp*:

In some cases this will undoubtedly be the result. But, as was said in *Elkins* [overruling the silver platter doctrine], “there is another consideration—the imperative of judicial integrity.” The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a

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<sup>28</sup> 489 U.S. 288 (1989).

<sup>29</sup> The transcript case would affect only convictions that had been appealed and then only in states that did not provide free transcripts to indigents; Justice Black’s plurality opinion assures us that “[m]any States” already provided free transcripts to indigent appellants. *Griffin*, 351 U.S. at 19. The case holding that juries should not be permitted to determine whether a confession is coerced dealt with a procedure in place in only fifteen states. *Jackson*, 378 U.S. at 403. Moreover, the number of coerced confessions claims is likely far smaller than Fourth Amendment violations. Finally, *Gideon v. Wainwright* affected only a few states; most states already provided indigent felony defendants with counsel.

<sup>30</sup> *Linkletter v. Walker*, 381 U.S. 618, 636–37 (1965).

<sup>31</sup> *Id.* at 637.

<sup>32</sup> *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (quoting *People v. Defore*, 150 N.E. 585, 587 (1926)).

government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States*: “Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”<sup>33</sup>

In Clark’s *Linkletter* opinion, by contrast, there is a single reference to judicial integrity, and the scope of the concept has been narrowed from the Government as lawbreaker to the silver platter problem. The effect of *Mapp*, Clark explained, was to “withdraw the invitation which *Wolf* extended to federal officers to step across the street to the state’s attorney with their illegal evidence”; *Mapp* thus “reject[ed] the double standard of admissibility of illegal evidence which tends to breed suspicion among the officers, encourages disobedience to the Constitution on the part of all the participants and violates ‘the imperative of judicial integrity.’”<sup>34</sup> The very next sentence shifts the focus back to deterrence:

In short, just as other cases had found the exclusionary rule to be a deterrent safeguard necessary to the enforcement of the Amendment, *Mapp* bottomed its rule on its necessity as a “sanction upon which [the Fourth Amendment’s] protection and enjoyment had always been deemed dependent under the *Boyd*, *Weeks* and *Silverthorne* cases.”<sup>35</sup>

And then, a page later, the *pièce de résistance*: “[T]he ruptured privacy of the victims’ homes and effects cannot be restored. Reparation comes too late.”<sup>36</sup> All of a sudden the focus is on the officer, not the government, as lawbreaker and the purpose of exclusion is deterrence.

Of course, as Maclin points out, Clark’s “ruptured privacy” argument proves too much. It is true in every case of exclusion that reparation comes too late. “Clark’s reasoning, thus, would support overruling *Mapp*—and *Weeks*.” (P. 112.) Despite his overblown rhetoric, Clark’s strategy put to rest the fears of a general “gaol delivery” and persuaded even Warren, Brennan, and Goldberg to join Clark’s *Linkletter* opinion.<sup>37</sup> Maclin is right that *Linkletter* was the end of “the short-lived

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<sup>33</sup> *Id.* at 659 (citations omitted).

<sup>34</sup> *Linkletter*, 381 U.S. at 634–35.

<sup>35</sup> *Id.* at 635 (brackets in original) (citations omitted) (quoting *Mapp*, 367 U.S. at 655).

<sup>36</sup> *Id.* at 637.

<sup>37</sup> Once the subject of a general gaol delivery, Maclin seeks to minimize that risk by noting correspondence between Justices Clark and Harlan in 1961 in which Clark claims that few prisoners would have objected to evidence on Fourth Amendment grounds prior to *Mapp* because such an objection would, at the time, have been futile. (P. 114.) That was probably an accurate statement of the law in 1961, but two years later, in *Fay v. Noia*, the Court established that prisoners could prevail

attempt to ground the exclusionary rule in a 'logically and constitutionally necessary' deduction from a fourth amendment 'right to privacy.'" (P. 111.)<sup>38</sup> Maclin concludes: "After *Linkletter*, the rule would forever be viewed by a majority of the Court as a deterrent-based remedy, and not mandated by the Constitution itself." (P. 111.) *Linkletter*'s retroactivity holding was overruled in *Teague v. Lane*,<sup>39</sup> but Clark's opinion continues to churn out damage to the exclusionary rule even today.

The next blow to *Mapp*, albeit not as hard a blow as *Linkletter*, was also struck by the Warren Court. The issue in *Alderman v. United States*<sup>40</sup> was whether the deterrence rationale of *Linkletter* conferred standing on defendants who lacked traditional standing to assert a Fourth Amendment claim. The notion, of course, is that more deterrence results if the right to suppress extends beyond those whose premises are searched or whose conversations are overheard. The Court, unsurprisingly, rejected this claim. Only Justice Fortas, joined by Justice Douglas, would have granted standing to anyone who was a target of the investigation.<sup>41</sup> Fortas read *Weeks* and *Mapp* broadly:

[I]f the exclusionary rule follows from the Fourth Amendment itself, there is no basis for confining its invocation to persons whose right of privacy has been violated by an illegal search. The Fourth Amendment, unlike the Fifth, is couched in terms of a guarantee that the Government will not engage in unreasonable searches and seizures. It is a general prohibition, a fundamental part of the constitutional compact, the observance of which is essential to the welfare of all persons.<sup>42</sup>

Maclin concludes: "This argument, one would think, might have persuaded

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on federal habeas corpus petitions even when they did not comply with state procedural rules as long as the failure was not a deliberate by-pass of "the orderly procedure of the state courts." 372 U.S. 391, 438 (1963). As *Fay* was the law when the Court decided *Linkletter*, I suspect the risk of a general gaol delivery did indeed exist in 1965.

<sup>38</sup> Maclin here quotes Steven R. Schlesinger & Bradford Wilson, *Property, Privacy, and Deterrence: The Exclusionary Rule in Search of a Rationale*, 18 DUQ. L. REV. 225, 237 (1980) (the internal quotation marks in Schlesinger & Wilson do not provide a source).

<sup>39</sup> It is not technically accurate to say that *Teague* overruled *Linkletter*. Only three other justices joined the parts of Justice O'Connor's opinion flatly rejecting *Linkletter* in the context of collateral attacks on convictions. But the next year, *Teague* was endorsed and clarified in *Butler v. McKellar*, which commanded a majority of the Court. 494 U.S. 407 (1990).

<sup>40</sup> 394 U.S. 165 (1969).

<sup>41</sup> *Id.* at 200 (Fortas, J., concurring in part and dissenting in part); *id.* at 187 (Douglas, J., concurring) (stating that he concurs in Part III of Justice Fortas's opinion "and would hold that the protection of the Fourth Amendment includes also those against whom the investigation is directed").

<sup>42</sup> *Id.* at 205 (Fortas, J., dissenting). Later in the opinion, in recognition of the standing cases that the Court had decided, Fortas limited his view of the right to suppress to those against whom a search is directed. *Id.* at 208.



liberal members of the *Alderman* Court like Warren, Brennan, and Marshall. But it did not.” (P. 123.) In rejecting the robust standing claim, *Alderman* treated deterrence as if it were the only purpose of suppressing evidence. To be sure, the defendants argued deterrence as the basis for broadening the standing doctrine, but the Court’s explanation of the relationship between standing and exclusion suggests that exclusion is about deterrence and only deterrence: “The necessity for that predicate [traditional standing] was not eliminated by recognizing and acknowledging the deterrent aim of the rule.”<sup>43</sup> Moreover, *Alderman* phrased the issue in terms of marginal deterrence: “But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.”<sup>44</sup>

Once again, I agree with Maclin, who puts the point beautifully:

In the post-*Mapp* era, the Warren Court altered the foundation of the exclusionary rule: exclusion was grounded on a deterrence model. This was a significant change from the premise of *Mapp*. In fact, it was a return to Frankfurter’s view of the exclusionary rule. Having finally decided to overrule *Wolf* in a revolutionary ruling that no one predicted, by the end of the 1960s, the justices had started a slow, but discernible, retreat from the implications and principles contained in *Mapp*. (P. 125.)

A discerning reader in 2014 could go back to *Linkletter* and *Alderman* and see the rhetorical damage done to *Mapp*. But the importance of the next case comes entirely from Maclin’s archival research. This is far from the only example Maclin gives of behind-the-scenes jockeying to undermine or overrule the exclusionary rule, but it is, I think, the best example. The conference that preceded *Whiteley v. Warden*,<sup>45</sup> decided in 1971, makes clear that at least three, and perhaps four, members of the Court were ready to overrule *Mapp*. When the opinion appeared, however, *Whiteley* was a most unremarkable case. *Whiteley* argued that the arrest warrant that led to the discovery of incriminating evidence of burglary was not based on probable cause. The Court agreed. One of the State’s arguments was that the arresting officers, who did not secure the warrant, could rely on the existence of the warrant; if it turned out the warrant was no good, the arrest was still good.<sup>46</sup> This, of course, is a good-faith argument. Oddly enough, the Court heard the case only because Justice White rejected the good-faith argument that he would

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<sup>43</sup> *Id.* at 174–75 (majority opinion).

<sup>44</sup> *Id.*

<sup>45</sup> 401 U.S. 560 (1971).

<sup>46</sup> *Id.* at 568.

embrace thirteen years later when he wrote *United States v. Leon*.<sup>47</sup> White's dissent from the initial decision to deny certiorari was eventually joined by Justices Douglas, Harlan, and Marshall. The Court restored the case to the docket. (P. 131.)

Even though neither litigant had addressed the exclusionary rule, the conference spoke of little else. Speaking first, Chief Justice Burger agreed with Justice White that if the sheriff who obtained the warrant had no right to arrest Whiteley, he could not create that right by telling another officer about the warrant. (P. 131.) But then Burger said, "we should put an end to the exclusionary rule" and concluded: "I'd overrule *Mapp* and *Weeks*." (P. 131.) Burger voted to affirm Whiteley's conviction on that basis. Justice Black, without stating his theory, also voted to affirm the conviction. Justice Douglas passed. Justice Harlan, who strongly believed in precedent being settled law until a majority could be found to overrule it, said that he "would overrule *Mapp* if a Court can be mustered for it." Justice Stewart stated that he agreed "with everything that John Harlan said." Justice White said he would not overrule either *Mapp* or *Weeks*. Justice Blackmun said that the case "really gets down to whether we should overrule *Mapp*." (P. 131.)

So at that point, three justices had expressed the view that *Mapp* should be overruled. Justice Blackmun, who had expressed deep skepticism about the exclusionary rule as early as 1961, was potentially a fourth vote. (Pp. 274-75.) Black was thus the key vote here, as he had been in *Mapp*. If Black's vote to affirm the conviction was based on dissatisfaction with the exclusionary rule, the Court presumably had five votes to overrule *Mapp* even though Justices Powell and Rehnquist—skeptics of the exclusionary rule—were not yet on the Court.

One wonders if during the conference on *Whiteley*, Burger, Harlan, and Stewart believed, or hoped, that Black had changed his mind on the exclusionary rule. If so, and if Blackmun could be brought aboard, the Court would have five votes to overrule *Mapp* a mere ten years after it was handed down. Having changed his mind once in his judicial career on this issue, however, Black was probably reluctant to change it again. *Mapp* survived. Justice Harlan wrote the opinion for the Court, holding that probable cause was lacking and also rejecting the State's argument that the arresting officers could rely on the existence of the warrant. In his dissent in *Whiteley*, Black argued that the warrant *was* supported by probable cause. That explained his vote to affirm the conviction. We will never know whether Black refused to join in overruling *Mapp* because he believed that the exclusionary rule remained a good idea or because of his unwillingness to waffle again. He died nine months later.

Now I return to *Calandra*, which held that the exclusionary rule does not apply to grand jury proceedings. Writing for the Court, Justice Powell seized on the "[r]eparation comes too late" rhetoric that Justice Clark helpfully put in his

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<sup>47</sup> 468 U.S. 897 (1984).

*Linkletter* opinion.<sup>48</sup> Of course, it is equally empty rhetoric in the grand jury context too. The holding of *Calandra* is not particularly surprising or important. Grand juries historically have operated with few restrictions on the evidence they can hear. As the Court pointed out, “[A]n indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, or even on the basis of information obtained in violation of a defendant’s Fifth Amendment privilege against self-incrimination.”<sup>49</sup> What is significant is that the Court once again pressed deterrence to the center stage as the only rationale for applying the exclusionary rule. And the best way to answer the deterrence question, as *Alderman* had suggested five years earlier, is to ask what marginal deterrence is achieved by a particular application of the exclusionary rule. “Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best.”<sup>50</sup> And, “[w]e therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.”<sup>51</sup>

In 1975, Justice Rehnquist took the next, very big step in another retroactivity case, *United States v. Peltier*.<sup>52</sup> In 1973, the Court had held in *Almeida-Sanchez v. United States* that searches away from the border, not at a check point, had to be based on probable cause.<sup>53</sup> The search in *Peltier* occurred four months before *Alemida-Sanchez* was decided. The government conceded in the Supreme Court that the *Peltier* search violated *Alemida-Sanchez*, but argued that it should not be given retroactive effect. (P. 156.) At the conference, the Court divided over whether retroactivity principles compelled reversal. Rehnquist, however, claimed that “exclusionary rule rationale” required reversal without regard to retroactivity. (P. 157.) Because the agents in *Peltier* could not know what the rule would be in *Alemida-Sanchez*, they were acting in good faith when they made the stop. As there were five votes to reverse the lower courts and affirm the conviction, Chief Justice Burger assigned the opinion to Rehnquist.

Rehnquist wrote an opinion based partly on retroactivity and partly on the lack of deterrence when the officers could not have known about a later case. He led off with a sentence that stressed good faith: “Four months before this Court’s decision in *Almeida-Sanchez v. United States*, respondent was stopped in his automobile by a roving border patrol, and three plastic garbage bags containing 270 pounds of marihuana were found in the trunk of his car by Border Patrol

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<sup>48</sup> *United States v. Calandra*, 414 U.S. 338, 347 (1974).

<sup>49</sup> *Id.* at 345 (citations omitted).

<sup>50</sup> *Id.* at 351.

<sup>51</sup> *Id.* at 351–52.

<sup>52</sup> 422 U.S. 531 (1975).

<sup>53</sup> 413 U.S. 266, 273 (1973).

Agents.”<sup>54</sup> In the closing paragraph in his opinion, Rehnquist closed the trap: “If the purpose of the exclusionary rule is to deter unlawful police conduct,” then the exclusionary rule should apply “only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.”<sup>55</sup>

It is important to understand how *Peltier* differs from the cases carving out a venue in which the exclusionary rule could never be deployed. *Calandra* carved out the grand jury venue. On July 6, 1976, the Court carved out two additional venues that *Mapp* could not reach: civil forfeiture cases<sup>56</sup> and federal habeas corpus cases when the state courts had considered the Fourth Amendment issue.<sup>57</sup> *Peltier*, on the other hand, was the first step toward a broad-based exception to the exclusionary rule that would apply when individual officers acted in good faith. In 1984, *United States v. Leon* built on the deterrence language from *Peltier* to hold that the exclusionary rule would not apply when an officer relied in good faith on a search warrant.<sup>58</sup> This is not based on exempting an entire venue from the exclusionary rule, because it applies in criminal cases, but it is limited to a category of searches. What appears to be bubbling up in the Roberts Court is a more robust good-faith exception for individual police mistakes not limited to a category, a view of the Fourth Amendment that I will argue follows from *Peltier*.

I think it fair to say that the Court, even the Warren Court, could not in the cold light of day face the fruits of its handiwork. As I have written elsewhere, it is one kind of legal regime to impose an exclusionary rule on a few federal prosecutions of gamblers, counterfeiters, drug users, and unlicensed distillers.<sup>59</sup> Moreover, it was easy to extend the exclusionary rule to the states in *Mapp*. Even though police were looking for evidence of bomb-making and gambling, they found only a few obscene items.<sup>60</sup> It is a very different legal reality when the Court’s handiwork denies reliable evidence of murder, drug distribution, and even burglary.<sup>61</sup> In addition, the police violation of the Fourth Amendment in *Mapp* was

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<sup>54</sup> *Peltier*, 422 U.S. at 532 (citation omitted).

<sup>55</sup> *Id.* at 542.

<sup>56</sup> *United States v. Janis*, 428 U.S. 433 (1976).

<sup>57</sup> *Stone v. Powell*, 428 U.S. 465 (1976).

<sup>58</sup> 468 U.S. 897, 913, 922 (1984).

<sup>59</sup> George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001).

<sup>60</sup> *Mapp v. Ohio*, 367 U.S. 643, 644–45 (1961). One irony of the exclusionary rule being extended to the states in *Mapp* is that certiorari was granted, and the case was briefed and argued, on the issue of whether a state could make illegal the possession of obscenity in a home; the Court would decide that issue, in favor of the defendant, eight years later in *Stanley v. Georgia*, 394 U.S. 557, 559 (1969).

<sup>61</sup> - The habeas petitioner in *Stone v. Powell*, 428 U.S. 465 (1976), was in prison for murder. Linkletter was in prison for burglary. Leon was charged with “selling large quantities of cocaine and methaqualone” from his home. *United States v. Leon*, 468 U.S. 897, 901 (1984). The defendant in

flagrant; the police acted in a “high-handed manner” and ran “roughshod over” “Miss Mapp,” in Justice Clark’s terminology.<sup>62</sup> When the police act in good faith, by definition there is no flagrant violation of the Fourth Amendment. In sum, the exclusionary rule is a much more costly enterprise when it applies to good-faith violations in state cases when gruesome crimes have been committed.

So far I have covered the period from *Weeks* in 1914 to *Calandra* in 1974 and *Peltier* in 1975 with a brief mention of *United States v. Leon* in 1984. I have highlighted the little understood contribution to the undoing of the exclusionary rule by two retroactivity cases, *Linkletter* and *Peltier*. Much happens to the exclusionary rule after 1975, but I will leave most of that story to Maclin. He tells the story very well, offering insight after insight. For example, he demonstrates that Chief Justice Burger’s triumph (in the war against the exclusionary rule) is to engraft onto the rule an inevitable discovery exception. Maclin endorses Albert Alschuler’s claim, and I think they are right, that the inevitable discovery exception is “a virus capable of killing” the exclusionary rule. (P. 286.)<sup>63</sup> I will turn to a recent example of this virus in a moment.

Another example of insightful story-telling is the behind-the-scenes account of *New Jersey v. T.L.O.*,<sup>64</sup> which was initially briefed and argued on the issue of whether the exclusionary rule should apply when the search is conducted by a state actor who is not a police officer—a school vice-principal in the case before the Court. The New Jersey Supreme Court had held that the evidence was inadmissible in the juvenile proceeding.<sup>65</sup> In the initial conference, the Court was split four-to-four with Rehnquist undecided. (P. 267.) After the conference, Rehnquist sent the other justices a memo that Brennan described as “the most forthright memo of the Term.” (P. 267.) It said, in its entirety: “I now vote to reverse this case. Whatever may be the arguments for and against this particular limitation on the Exclusionary Rule, my disagreement with *Mapp v. Ohio* remains so fundamental that I will seize any opportunity to limit the damage done by that case.” (P. 267.) The Court ultimately decided not to answer the exclusionary rule question; it ordered the case be reargued on the question of whether the search violated the Fourth Amendment. (P. 272.) The Court ultimately held, six to three, that the search was valid; the exclusionary rule question was avoided.

Now I want to fast forward to 2009 to show the reader the bridge that I see (thanks to Maclin’s book) between *Peltier*, ostensibly a retroactivity case, and the exclusionary rule machinations of the Roberts Court. *Peltier* stressed that there was no reason to give retroactivity effect to the exclusionary rule because the

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*Massachusetts v. Sheppard*, 468 U.S. 981 (1984), another “good-faith” case, was convicted of murder.

<sup>62</sup> *Mapp*, 367 U.S. at 644–45.

<sup>63</sup> Here, Maclin quotes Albert Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 IOWA L. REV. 1741, 1808 n.331 (2008).

<sup>64</sup> 469 U.S. 325 (1985).

<sup>65</sup> *State ex rel. T.L.O. v. Engerud*, 463 A.2d 934, 943–44 (N.J. 1983).

purpose of the rule was deterrence, and, by definition, officers who violated the Fourth Amendment before it applied to their conduct could not possibly be deterred. But that, too, is a virus capable of killing the exclusionary rule. The virus has escaped its quarantine in *Herring v. United States*.<sup>66</sup>

Police arrested Herring on a warrant that had been recalled five months earlier. Because of a police error, the recall did not appear in the database that the police clerk consulted when the officer radioed to ask if there were outstanding warrants on Herring. Unlike the other good faith cases, the error here was one made by law enforcement. So we have an arrest based on a police mistake about whether there was an outstanding arrest warrant. The Court affirmed the conviction, painting with a broad brush when it explained the holding: "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."<sup>67</sup> That statement suggests, for example, that a police officer who negligently believes he has probable cause to arrest, when he does not, has not committed a violation of the Fourth Amendment that requires exclusion of the evidence found during the arrest.

To be sure, the best reading of the holding is much narrower, as Albert Alschuler, Orin Kerr, and Wayne LaFave, among others, have noted.<sup>68</sup> The narrow holding is stated at the close of the second paragraph in the case: "Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence."<sup>69</sup> This reading, which Alschuler characterizes as a minnow or a "little blast," would apply only to isolated book-keeping errors made by someone other than the arresting officer.<sup>70</sup> The "little blast" reading, which Orin Kerr has embraced, makes *Herring* a "minor case."<sup>71</sup>

But I do not believe *Herring* will prove to be a minor case. As Wayne LaFave notes, the analysis in *Herring* "far outruns the holding."<sup>72</sup> Alschuler argues convincingly that the "big blast" statements that suggest tying exclusion to the level of culpability of the officer are trial balloons to allow the issue to "percolate" so that the Court can "gain the 'wisdom' of lower courts and commentators before

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<sup>66</sup> 555 U.S. 135 (2009).

<sup>67</sup> *Id.* at 144.

<sup>68</sup> See Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 463–64 (2009); Wayne R. LaFave, *The Smell of Herring: A Critique of the Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 787 (2009); Orin Kerr, *Responding to Tom Goldstein on Herring*, VOLOKH CONSPIRACY, (January 14, 2009 1:38pm), [http://www.volokh.com/archives/archive\\_2009\\_01\\_11-2009\\_01\\_17.shtml](http://www.volokh.com/archives/archive_2009_01_11-2009_01_17.shtml).

<sup>69</sup> *Herring*, 555 U.S. at 137.

<sup>70</sup> Alschuler, *supra* note 66, at 463. ("Minnow" appears in the title. For one use of "little blast," see *id.* at 475.).

<sup>71</sup> Kerr, *supra* note 68.

<sup>72</sup> LaFave, *supra* note 68, at 770.

resolving it definitively.”<sup>73</sup> There is plenty of ammunition in *Herring* and an earlier Roberts Court case, *Hudson v. Michigan*,<sup>74</sup> to support an exclusionary rule revolution.

The issue in *Hudson* is quite narrow: whether to apply the exclusionary rule when the police have a valid warrant but do not comply with the knock and announce rule of *Wilson v. Arkansas*.<sup>75</sup> The holding that the exclusionary rule does not apply to knock and announce violations is an example of the inevitable discovery virus. Part of the Court’s rationale was that because the officers had a search warrant, they would inevitably have discovered the evidence in the house; that they failed to knock and announce was not viewed as causal. Justice Breyer’s dissent, joined by three other members of the Court, complained that this was an unorthodox application of inevitable discovery and of the theory of causation.<sup>76</sup> As Wayne LaFave describes the Court’s theory that the violation did not cause the police to seize the evidence: “If we hadn’t done it wrong, we would have done it right.”<sup>77</sup> But the more unorthodox the application, the more it shows that the virus is mutating.

Indeed, *Hudson*’s expansive dicta reads like an obituary for the exclusionary rule. After noting *Weeks* and *Mapp*, the Court flatly asserts, without authority, that “[s]uppression of evidence . . . has always been our last resort, not our first impulse.”<sup>78</sup> The Court then repeats what it has said countless times about the heavy costs of suppression. In the next section, the Court characterizes exclusion as an anachronism in today’s world that is, it claims, friendlier to tort suits against officers who violate the Fourth Amendment:

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago. Dollree Mapp could not turn to Rev. Stat. § 1979, 42 U.S.C. § 1983, for meaningful relief; *Monroe v. Pape*, . . . which began the slow but steady expansion of that remedy, was decided the same Term as *Mapp*. It would be another 17 years before the § 1983 remedy

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<sup>73</sup> Alschuler, *supra* note 68, at 477.

<sup>74</sup> 547 U.S. 586 (2006).

<sup>75</sup> 514 U.S. 927 (1995).

<sup>76</sup> The majority does not use the term “inevitable discovery” but speaks instead of “attenuated” causation. See, e.g., *Hudson*, 547 U.S. at 603. The dissent, however, understands the claim to be an inevitable discovery claim. See *id.* at 615–19 (Breyer, J., dissenting) (using “inevitable discovery” seven times).

<sup>77</sup> Wayne R. LaFave, 1 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 347 (5th ed. Supp. 2012). LaFave quoted Judge Sam Ervin III, who used the phrase in *United States v. Thomas*, 955 F.2d 207, 210 (4th Cir. 1992).

<sup>78</sup> *Hudson*, 547 U.S. at 591.

was extended to reach the deep pocket of municipalities . . . . Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court's decision in *Bivens v. Six Unknown Fed. Narcotics Agents*.<sup>79</sup>

It is not, in the Court's view, just the increasing availability of tort remedies that makes exclusion less necessary today. There is also "the increasing professionalism of police officers, including a new emphasis on internal police discipline."<sup>80</sup> The Court concluded as follows:

In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrents against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.<sup>81</sup>

So *Mapp* is relegated to the "long ago" world in which there were no realistic ways to achieve deterrence other than suppression. Let's look again at what I think is the key sentence from *Herring*: "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."<sup>82</sup> There is a lot packed into that sentence. The focus on deliberate police conduct raises the exclusion bar quite high. The Court uses the word "deliberate" nine times in its opinion. The Court quoted Judge Henry Friendly's argument for a narrow application of *Mapp*: "[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights."<sup>83</sup> The Court stressed that *Mapp* was, after all, precisely that kind of case.<sup>84</sup> And Justice Ginsburg's dissent understands the majority to be threatening to limit the exclusionary rule to "flagrant or deliberate misconduct."<sup>85</sup>

The other half of the *Herring* rationale is that the misconduct must be "sufficiently culpable that such deterrence is worth the price paid by the justice

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<sup>79</sup> *Id.* at 597 (citations omitted).

<sup>80</sup> *Id.* at 598.

<sup>81</sup> *Id.* at 599.

<sup>82</sup> *Herring v. United States*, 555 U.S. 135, 144 (2009).

<sup>83</sup> *Id.* at 143 (brackets in original) (omission in original) (quoting Henry Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965)).

<sup>84</sup> *Herring*, 555 U.S. at 144.

<sup>85</sup> *Id.* at 148 (Ginsburg, J., dissenting).



system.”<sup>86</sup> This fits like a glove with the first half of the rationale. Flagrant, deliberate, and reckless police violations of the Fourth Amendment can be deterred; they are also culpable. Negligent violations of the Fourth Amendment are not, in individual cases, susceptible to deterrence, and they are less culpable than violations that are deliberate or reckless.

Whether *Herring* winds up being a shark or a minnow, my point here is that the “big blast” statements follow naturally from *Peltier*, decided more than three decades earlier. The case I had never read until I read Maclin’s book is a clear and direct bridge to *Herring* and perhaps to the future. *Herring* said, “[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it . . . .” *Peltier* said, “[i]f the purpose of the exclusionary rule is to deter unlawful police conduct,” then the exclusionary rule should apply “only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.”<sup>87</sup> All the exclusionary rule cases decided between *Peltier* and *Herring* now might be quite beside the point.

William Rehnquist was a fierce opponent of the exclusionary rule. Recall his memo to his colleagues in *T.L.O.* saying that he would “seize any opportunity to limit the damage done by” *Mapp*. (P. 267.) His earliest public expression of views on this issue occurred when he was an Assistant Attorney General in charge of the Office of Legal Counsel in the early years of the Nixon presidency.<sup>88</sup> It is conventional wisdom that Rehnquist failed to get the votes to overrule *Mapp*, as his former clerk and my friend, the late Craig Bradley, said in 2005.<sup>89</sup> And, to be sure, *Mapp* has yet to be, and may never be, overruled. But 2005 was too early to judge the effect of Rehnquist on the exclusionary rule. The full effect of Rehnquist’s *Peltier* opinion was not visible until *Herring* in 2009. Building on the Warren Court’s reluctance to embrace its own creation in *Linkletter*, Justice Rehnquist in *Peltier* quite deliberately set the stage for *Herring*. And *Herring* sets the stage for what I believe is the next step in the dismantling of *Mapp*.

Justice Clark’s opinion in *Mapp* was certainly a bad opinion, and Black’s concurrence created even more problems. *Mapp* was unstable from the beginning, and when the political climate shifted, its enemies exploited the weaknesses. *Mapp*’s requirement of suppression is surely right on its facts involving flagrant, abusive police misconduct, as the Court freely concedes in *Herring*.<sup>90</sup> But perhaps it was a mistake to incorporate the robust federal exclusionary rule into the Fourteenth Amendment. Perhaps *Wolf* was right when routine, good-faith

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<sup>86</sup> *Id.* at 144.

<sup>87</sup> *United States v. Peltier*, 422 U.S. 531, 542 (1975).

<sup>88</sup> WHSF: Dean: Box 24: Crime and the Rights of the Accused, NARA, 8–12.

<sup>89</sup> Craig Bradley, *Rehnquist’s Legacy*, THE JURIST, (November 29, 2013), <http://jurist.org/forum/2005/09/rehnquists-legacy.php>.

<sup>90</sup> *See Herring*, 555 U.S. at 144.

violations of the Fourth Amendment are concerned. It is perhaps a bridge too far to force state courts to suppress reliable evidence of serious crimes when the Fourth Amendment is silent as to remedy and the police are acting in good faith. Given the language of the Court in *Hudson* and *Herring*, it is easy to imagine a Fourth Amendment world in which facts similar to those in *Mapp* require state courts to suppress evidence but not routine, good-faith police mistakes. Stay tuned for the next chapter in the *Mapp* saga. Oh, and pick up a copy of Tracey Maclin's book so you can really understand the soap opera.